APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1749

UNITED STATES OF AMERICA

v.

W. A. BOYLE, Appellant.

Appeal from the United States District Court for the District of Columbia

---

Argued 2 March 1973

Decided 16 July 1973

Before McGOWAN, TAMM, and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: Appellant W. A. Boyle is the former president of the United Mine Workers of America.

Convicted on thirteen counts as an officer of the UMW of having (1) consented to unlawful contributions of labor union funds to the campaigns of candidates for federal office,[1] (2) unlawfully converted union funds for the pur-

---

[1] This charge was based on the provisions of 18 U.S.C. § 610 (1970), which at the time of the indictment in this case provided:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary electioin or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
>
> Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

pose of making such a contribution,[2] and (3) conspired with others to commit these two offenses,[3] appellant seeks reversal under a number of theories.[4] We conclude that appellant's conviction on all charges was proper and affirm the District Court.

I. *Facts*

Labor's Non-Partisan League (League) was created in 1936 by the Congress of Indiustrial Organizations (CIO) to act as its legislative and lobbying arm. In 1940 the

---

[2] This charge was based on the provision of 29 U.S.C. § 501(c) (1970), which provides:

> Any person who embezzles, steals, *or unlawfully and willfully abstracts or converts* to his own use, or *the use of another*, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. (Emphasis added.)

[3] This charge was based on the provisions of 18 U.S.C. § 371 (1970), which provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[4] The full text of the thirteen-count indictment is set forth in the Joint Appendix at pp. 18-33. Count I of the indictment alleged that appellant and two other individuals conspired in violation of 18 U.S.C. § 371 (1970) to violate two federal statutes—18 U.S.C. § 610 (1970) and 29 U.S.C. § 501(c) (1970). Counts II through XII of the indictment charged appellant with eleven substantive violations of 18 U.S.C. § 610 (1970). Count XIII of the indictment charged appellant with a substantive violation of 29 U.S.C. § 501(c) (1970).

UMW left the CIO to become a separate entity. At that time the League as originally constituted disbanded, only to be immediately reconstituted as the lobbying and information branch of the UMW alone.

In persons and in property the League and the UMW have been closely identified. Since 1940 the president of the League and the current president of the UMW have been one and the same. From the time of the separation in 1940 until the time of the indictment in this case the League received all but a small portion of its funds from the UMW's general treasury.[5]

In 1947 Congress passed legislation which prohibited some forms of political contributions by labor organizations to candidates for federal office.[6] Following the Act's passage the League made no more contributions to federal candidates until the mid-1960's.

In 1963 appellant Boyle became president of the UMW and automatically chairman of the League. In 1966 the UMW began again to be solicited for contributions by candidates for federal office, chiefly those who had recently discovered the "testimonial dinner" as a fountain of funds. Boyle knew of and authorized contributions which were made out of the League's treasury for this purpose, as the trial jury found.[7]

---

[5] There is actually no evidence in the record that the League's funds came from any source other than the UMW general treasury. The Government, however, was unable to prove the origin of a relatively small portion of the League's funds during the period of 1942 to the time of the offenses in this case. Thus, we do not *know* that *all of* the League's funds came from the UMW treasury. Appellant attempts to make much of this inability to prove the source of this small portion of the League's funds. This inability is, however, irrelevant, as we shall illustrate in Part IIA, *ante*.

[6] *See* footnote 1, *supra*.

[7] We do not understand appellant to contest these sufficiency of the evidence to support these and other facts stated in this section of our opinion.

Robert Howe, director of the League for a part of the time in question, testified that he was concerned that contributions by the League might violate 18 U. S. C. § 610, which makes it "unlawful . . . for any labor organization to make a contribution" to a federal campaign. He testified that he and James Kmetz, another employee and Howe's successor as director, sought to hide the source of these funds by having checks on the League's account made out to cash, depositing the proceeds in their personal accounts, and then making the contributions with a personal check. The evidence is sufficient to permit a conclusion that Boyle knew and approved of this practice, that he knew of Howe's fears that the contributions were illegal, and that he knew and approved of efforts to conceal the source of the funds involved.

Monthly statements of these transactions were prepared. Appellant's executive secretary, Suzanne Richards, instructed that only one copy of this be sent to Boyle's office and that no copies be kept in the files of the League. Richards also instructed Howe to destroy any evidence that might incriminate Boyle or the UMW.

In the spring of 1969 the League's treasury was depleted. At the request of Kmetz, Boyle authorized a transfer of $5,000, which he characterized as a "loan," from the UMW treasury to the League. The jury concluded that this amount was actually transferred to facilitate the making of a political contribution by the League[8] This transfer was ratified by the International Executive Board of the UMW over two years after the "loan" in question.

---

[8] Count XIII of the indictment charged appellant with violating 29 U.S.C. § 501(c)(1970), by transferring the $5,000 from the UMW to the League account. Count XII of the indictment charged appellant with violating 18 U.S.C. § 610 (1970) by authorizing this $5,000 to be used as a campaign contribution.

II. *Legality of the Political Contributions*

As of the date of the indictment in this case, 18 U.S.C. § 610 (1970) provided in relevant part:

> It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with . . . [a federal election].
>
> [E]very . . . officer of any labor organization, who consents to any contribution or expenditure by the . . . labor organization . . . in violation of this section, shall be . . . [fined and/or imprisoned].

The trial court found that the contributions described above constituted a violation of this Act, and that appellant Boyle was subject to fine and imprisonment for consenting to these contributions. Appellant contends that his conviction under this statute was invalid because: (A) the Government did not allege or show and the jury did not find that the funds contributed came from an "involuntary" source prohibited under the statute, and (B) the statute is an unconstitutional infringement on the union's freedom of speech.

A. *The Need to Show an "Involuntary" Source.*

On its face § 610 requires that the Government establish five distinct elements in order to prove a violation. The Government must prove beyond a reasonable doubt that (1) a labor organization (2) made a contribution or expenditure (3) in connection with a specified federal election (4) for purposes of active electioneering and that (5) the defendant officer consented to the making of the contribution Appellant does not contest that the jury was properly charged on these elements, nor that there was sufficient evidence to permit the jury to find that these elements had been proved.

Appellant contends, however, that an additional element must be established to support a guilty verdict under

§ 610. He argues that there is a violation if, and only if, money ultimately contributed to a political candidate was collected by that union or organization through payments "actually or effectively required for employment or union membership."[9] Such funds would, for example, be money collected from members in the form of dues or assessments and may be characterized as being given "involuntarily" to the union or affiliated organization in order for a person to remain a member of the union. Appellant contends that only contributions of such "involuntary" funds are forbidden, that the union is free to contribute any other funds it controls if those funds come from a "voluntary" source. Such a voluntary source, according to appellant, could be contributions by union members not required for membership or gifts to the union from outside sources.

Appellant's argument is based on language in the Supreme Court's decision in *Pipefitters* v. *United States*.[10] That decision held that not all political contributions by labor organizations are prohibited by § 610, but only those derived from funds which "were actually or effectively required for employment or union membership."[11] This additional element of the offense in *Pipefitters* was found by the Supreme Court not in the express language of the statute, but rather in the legislative history of the enactment. The opinion reversed the convictions because the "jury instructions failed to require proof of [this] essential element of the conviction . . ."[12] Appellant argues that in Boyle's case, as in *Pipefitters*, the jury was not in-

---

[9] Appellant's brief at 14, quoting the Supreme Court's decision in *Pipefitters* v. *United States*, 407 U.S. 385 at 439 (1972).

[10] 407 U.S. 385 (1972).

[11] *Id.* at 439.

[12] *Id.* at 436.

structed and did not find that the contributions came from an "involuntary" source.

We believe, however, that appellant misconstrues the import of the language relied on in *Pipefitters*. The Court there repeatedly emphasized that its discussion dealt with a separate, segregated fund in which there was "strict segregation of its monies from union dues and assessments."[13] The *Pipefitters* fund was composed of contributions by union members that were not required for membership and which at least superficially did not appear to have been the product of a coercion. 'Strict segregation," combined with the appearance that the funds were not coerced from union members, raised a presumption that the money contributed was derived from a "voluntary" source. Logically, when the union has taken the precautions necessary to make it appear that the funds were given voluntarily for use in political campaigns, the burden should be on the Government to prove the contrary.

In Boyle's case, though, contributions were made from funds derived from the general UMW treasury, which was composed predominatly of dues, assessments and other "involuntary" funds. The UMW made no effort to segregate dues and assessments from funds that might be legally contributed to political campaigns.

The legislative history of § 610 reveals Congress" primary concern that funds from a general union treasury not be available for federal politcal campaigns.[14] The Court in *Pipefitters* explicitly interpreted the section as being designed to prohibit expenditures from the "general union treasury."[15]

---

[13] *Id.* at 414. For other references in the opinion to the need to keep political funds separate from the general union treasury, *see id.* at 401, 416, 417, 421 and 429.

[14] *See* the analysis in *Pipefitters, supra,* at 407-14 and 416-27.

[15] *Id.* at 414.

The clear intent of § 610, as evinced in the legislative history and interpreted by the Supreme Court, is to *permit* expenditures from separate, segregated funds if the contributions to it were, in truth, voluntary, and to prohibit expenditures from a union's general treasury.[16] If the Government proves that the source of the funds directed to a political contribution is the general union treasury, derived in part from dues and assessments, this is all that need be established on the question of voluntary or involuntary contributions.

This interpretattion is the only one consistent with policies underlying § 610. Appellant's contention, stripped of legalisms, is that the Government must show in all circumstances that the contributions *could not* have come from a "voluntary" source. Since the funds expended here were derived from the UMW general treasury, this reading would require the Government to determine the sourc of all funds that have flowed through the treasury during the period in question, and to prove that this amount (which could run into the hundreds of millions) could not have been derived from a voluntary source. This would place an insuperable burden on the Government; likewise, and even more perniciously contrary to the avowed objectives of the Act, it would also place a prem-

---

[16] If "voluntary" and "involuntary" funds are commingled and then a portion is expended for political purposes, it is impossible to tell whether the "voluntary" or the "involuntary" money is being expended. One can only assume that a proportionate share of each is being spent. Thus, Congress in prohibiting expenditures from commingled funds will be presumed to consist of proportionate shares of the different types of money. For this reason it was irrelevant that the Government was unable to show the source of a small portion of the money in the League treasury. A substantial, or huge, portion of the money in the League treasury was "involuntary" at the time of the contribution. This "involuntary" portion may be presumed to be a part of each expenditure from the commingled funds.

ium on poor bookkeeping by discouraging unions from maintaining complete records of revenue. The resulting difficulty in tracing the sources of union contributions would make § 610 virtually useless.

In *Pipefitters* the Court held that solicitation of contributions for the segregated political fund "must be conducted under circumtances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power."[17] There is no contention that there was ever a report to the UMW membership that any transfers were being made from the general UMW treasury to the League. In fact, evidence shows that steps were taken to conceal this. Appellant's argument on voluntariness thus is in first and last analysis an argument that "contributions" by UMW members were "voluntary" when the individual UMW member knew, and could have known, nothing about his own "contribution." Congress intended to protect individual union members against both overtly coerced and unknown contributions; each is equally involuntary.

Boyle's case, involving transfers from the UMW general treasury derived principally from dues, assessments, and other obligatory member contributions, is thus different from *Pipefitters*. Where there are *individual* contributions to a fund which is ostensibly set up as a separate "voluntary" affair, then there is a rational justification for requiring the Government to prove, and the jury appropriately to be so charged, that the contributions ultimately employed politically were involuntary. This the Supreme Court held in *Pipefitters*. But in Boyle's case the "contributions" to the separate fund, the League, were alleged to be a series of massive infusions from the

[17] 407 U.S. at 414.

UMW's general treasury, not a multitude of contributions from individual members, as in *Pipefitters*. Boyle's evidence raised no issue of the "voluntariness" of individual members' contributions to the UMW general treasury; quite the contrary, dues, assessments and other obligatory payments were accepted as making up the individual members' contributions.

Hence a jury charge of the style found necessary in *Pipefitters* would have raised an issue of "voluntariness" of individual contributions that does not exist in Boyle's case; the undisputed evidence establishes the involuntary nature of the members' contributions to the UMW general treasury; the jury should never have been permitted to find that individual members authorized "voluntary" political contributions of which they knew nothing, and the jury was not so instructed.

The proper issue here, by which the Government was required to and did satisfy its burden of proof of involuntariness, was the source of the funds transferred into the League account. If this source was the UMW general treasury, its nature established the funds as involuntarily obtained from the UMW members; no subsequent legerdemain by an official or board of the UMW could make voluntary what had been involuntary in origin. Clearly, the indictment here alleged that the source of the contribution was the UMW general treasury.[18] Sufficient evidence was adduced at trial to permit the issue to reach the jury, and the jury was properly instructed that it must

---

[18] Joint App. at 3. As the Supreme Court said in *Pipefitters*: "... an indictment that alleges a contribution or expenditure from the general treasury of a union or corporation in connection with a federal election states an offense. *See* nn. 47 and 48, *infra*. The unanimous vote of the union members or stockholders may at most (but we need not now decide) be a defense." 407 U.S. at 416 n. 28.

find that the contributions came from such funds.[19] The Government, consequently, established and the jury found all of the elements necessary to show a violation of § 610.

B. *The Constitutionality of § 610*

Appellant argues that even if *Pipefitters* does not compel reversal, the convictions under § 610 must be overturned because that statute imposes an unconstitutional limitation on the union's freedom of speech. He does not dispute that Congress may legitimately regulate federal campaign financing and that there must be valid reasons to limit spending by a union. Appellant contends, however, that the legitimate goals of the statute may be achieved in a manner that will not so substantially restrict the union's right to present its views by supporting candidates of its choice. If it is true that the legitimate goals of the statute may be achieved in a less restrictive manner, the statute is overbroad. Even when a compelling interest exists, if the statute protects that interest by a needless infringement of First Amendment rights, it must be struck down.[20]

Appellant seeks to invoke this principle by pointing to one purpose of § 610, to assure the purity of the federal electoral process by preventing undue influence by labor unions who might use the aggregated wealth of their general treasuries in federal elections. He then contends that this goal may be achieved less restrictively by limiting the maximum amounts which could be contributed by unions, rather than by banning contributions entirely. This misapprehends the scope and scheme of § 610. That provision, as interpreted in *Pipefitters,* only prohibits

---

[19] Joint App. at 177-78.

[20] *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479 (1960). The issue of the statute's constitutionality was explicitly preserved in *Pipefitters, supra,* at 400.

contributions from monies which are not strictly segregated from union dues and assessments.[21] Appellant's suggested alternative would actually be more restrictive than § 610; unions may now contribute *any amount* so long as it is from a proper source, while under appellant's suggestion the maximum would be limited.

Appellant then points to a second purpose of § 610, to assure that a dissenting union member is not *forced* to contribute, in the form of mandatory dues and assessments, to support political views with which he disagrees. Appellant contends that this admittedly justifiable goal of protecting minority interests could be protected less restrictively in one of two ways.

First, appellant asserts that minority interests are adequately protected by the "democratic" procedures under which a union must operate. It is argued that majority approval of political expenditures would somehow validate the unwanted burden placed upon dissenters. Democratic majority rule does not, in itself, necessarily protect minority interest. Indeed, it is based on the premise that the losing side (the minority) must accept the dictates of the winning side (the majority). Democracy in labor unions as elsewhere, without additional protection, does nothing more than hold forth the possibility that in time the minority may become the majority. By definition the protection of minority interests requires that the majority be restrained in exercising its will over the minority. If a union could expend "involuntary" funds upon the vote of a majority of its members, minority interests would not be protected—they would be rendered irrelevant.

Second, appellant argues that Congress could have protected minority rights by adopting the mechanism employed in Great Britain. This permits the refunding of

[21] *See* text accompaning footnotes 10-12, *supra.*

a proportionate amount of a member's dues if the dissenter gives notice of his disagreement. Appellant argues that

> [l]egislation protecting the minority union member could be drawn to permit either of two forms: "contracting in," in which all members approving of the proposed political assessment would be required to give affirmative evidence of such approval, or "contracting out," in which a union member objecting to the political use of a portion of his dues could refuse to tender that particular assessment."[22]

This argument ignores the fact that § 610, as interpreted in *Pipefitters*, does establish a system of "contracting in" just as appellant suggests. Unions are permitted to make contributions if assenting members "give affirmative evidence of such approval" by assenting to having a deduction made from the member's pay check.[23]

Assuming, only arguendo, that § 610 does restrict in some degree a union's otherwise unlimted right of free speech, appellant has failed to advance a less restrictive alternative to § 610 which will both prevent the use of a union's aggregate wealth in federal elections and protect union minority interests, and we have found elsewhere no such viable less restrictive alternative. We hold § 610 to be constitutional.

III. *The § 501 Conviction.*

Appellant allegedly violated 29 U.S.C. §501(c) (1970), which provides that

> any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities,

---

[22] Appellant's Brief at 36.

[23] *Ibid.*

> property, or other assets of a labor organization of which he is an officer . . . [will be subject to fine or imprisonment].

The jury found that appellant violated this law by ordering the transfer of the $5,000 "loan" described above from the UMW general treasury to the League treasury with the knowledge and for the purpose of making a political contribution. Appellant does not contest that the transfer was a conversion of union funds to "the use of another." Rather, appellant argues that for two reasons this conversion was not unlawful.

First, relying on the Second Circuit's opinion in *United States* v. *Silverman*,[24] appellant argues that such a transfer violates §501(c) only if the jury finds that (1) the conversion was made without a bona fide authorization by the union, or (2) that the union derived no benefit from the transfer. Appellant's reliance upon the *Silverman* rationale is misplaced. The *use* to which the money was converted in that case, support of a candidate for state office, was not unlawful. The court stressed that there was no legal bar to the use *if* the transfe was properly authorized by the union.[25]

Regardless of the validity of the Second Circuit's analysis is situations where the use is lawful, the holding in *Silverman* has no relevance here. In the instant case the use to which the money was converted could not have been lawful. As we have seen, the contribution of the $5,000 constituted a violation of §610. Neither authorization by any union officer or body, nor any resulting benefit to the union, would have rendered lawful the transfer of general union funds to a federal political campaign. In

---

[24] 430 F.2d 106 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).
[25] *Id.* at 412.

Pipefitters[26] the Supreme Court specifically reserved the question whether even a *unanimous* vote of all union members could validate a union political contribution under §610.

Thus, approval or benefit cannot make the conversion to "the use of another" in this case any less unlawful. If the use to which the money is knowingly transferred is unlawful, then the transfer constitutes a violation of § 501(c). The jury was properly instructed that this was the applicable standard, that it had to find the appellant authorized the transfer knowingly for the purpose of making indirectly a political contribution, and there was sufficient evidence to support its conclusion.[27]

Second, appellant seems to argue that §501(c) was intended to punish union officials only if the jury finds that the officer did not have at the time a "bona fide belief in the legality of his action . . ."[28] The argument is that the statute is intended to punish only *knowingly* illegal or *ultra vires* expenditures, and that union officials will be granted great latitude in forming their bona fide beliefs as to whether an expenditure is within the legal objectives of the union organizatoin. Under this reading, §501(c) would never punish for a transfer, even if the official knew that the money was to be used for an unlawful purpose, if the official could have reasonably believed that the transfer was authorized under the union's constitution, bylaws, and procedure. Appellant contends that he was prejudiced by the court's refusal to permit him to argue as a defense that he believed the transfer was authorized.

This interperetation is founded upon passages in the Congressional debates on the statute in which individual

---

[26] See quotation in n. 18, *supra.*

[27] Joint App. at 184.

[28] Appellant's Reply Brief at 10.

Congressmen discussed, in general terms, the Labor-Management Reporting and Disclosure Act of 1959, of which §501(c) is a small part.[29] The thrust of the dialogue relied upon is that the Act will not punish an officer for an expenditure

> [i]f it is made in accordance with, and for a purpose permitted by, the constitution, bylaws or regularly adopted resolutions of the union's constitutional governing bodies, the officer or employee will not be required at his peril to determine whether or not the constitution, bylaws or resolution goes beyond the legitimate purposes and objectives of the organization.[30]

The relevance of this language in this context is at best ambiguous, and the remarks by individual Congressmen made during a floor debate are not the most persuasive form of legislative history. We believe, in any case, that the remarks relied upon do not support appellant's reading of the statute. The passage simply says that a transfer will not be deemed unlawful merely because it is made for a purpose that is *ultra vires* what the court determines to be the legitimate functions of a union.

As we have noted, however, the transfer in this case was not for a purpose that was *ultra vires,* but rather for a purpose that was itself a crime. There is no hint in either the statute or its legislative history that indicates a Congressional intent to excuse from the ambit of §501(c) transfers for a criminal purpose. No officer or union governing body could in all logic believe that a transfer for a criminal purpose was for a legitimate union purpose, was

---

[29] 105 Cong. Rec. 17900 (1959) (remarks of Senator Kennedy); 105 Cong. Rec. 15690 (1959) (remarks of Congressman O'Hara).

[30] 105 Cong. Rec. 15690 (1959) (remarks of Congressman O'Hara).

authorized by the union constitution or bylaws, or was for the union's benefit.

Appellant argues that our construction means that §501(c) duplicates 18 U.S.C. §610, which was discussed above. The argument is that Congress could not have intended to enact two statutes that punish officers for contributions to federal political campaigns, and hence §501(c) must be construed as requiring something that is not required for a violation of § 610—specifically, knowledge that the act is unauthorized.

This argument fails, because the statutes as we construe them do not punish identical conduct. Section 610 punishes officers who "consent to" political contributions. Section 501(c) punishes, in this case, an officer who "abstracts or converts" union funds to use in a federal political campaign. The first statute is violated by an officer who simply knows of and acquiesces in the expenditure of union funds for a political campaign; the second requires some affirmative action to transfer union funds for this or any other unlawful purpose, and the unlawful objective may or may not have anything to do with prohibited union political contributions.

IV. *Conspiracy to Commit the Substantive Offenses*

Count one of the indictment charged that appellant conspired with Owens, Kmetz, Richards and another alleged co-conspirator to commit the substantive acts of conversion and unlawful contributions to federal campaigns. Appellant does not contest that if the conversion and contribution were indeed unlawful, that there was sufficient evidence of a conspiracy to commit those crimes to permit the submission of the issue to the jury. Rather, he argues that the same proof was introduced to prove the conspiracy and the substantive counts, and that he was consequently convicted twice for the same offense in violation of the double jeopardy clause of the Fifth Amend-

ment to the United States Constitution. Under this theory, the substantive and conspiracy counts would have merged into a single offense and the Government could not have proceeded under both. Appellant also suggests that while the conspiracy conviction may have been proper in a narrow technical sense, this court, under its general supervisory power over federal criminal trials, may set aside the conspiracy conviction as being somehow unfair or unjust.

A. *Double Jeopardy*

"It is settled law in the country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See *Pinkerton* v. *United States*, 328 U.S. 640, 643-44, and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy."[31] It is also irrelevant that the "overt acts charged in the conspiracy counts were also charged and proved as substantive offenses."[32] This general rule is based on the fact that

> a combination of persons to commit a wrong, either as an end or as a means to an end, is so much more dangerous because of its increased power to do wrong, because it is more difficult to guard against and prevent the evil designs of a group of persons than of a single person, and because of the terror which fear of such a combination tends to create in the minds of people.[33]

---

[31] *Pereira* v. *United States*, 347 U.S. 1, at 11 (1954).

[32] *Pinkerton* v. *United States*, 328 U.S. 640 at 644 (1946).

[33] *Dennis* v. *United States*, 341 U.S. 494, 573 (1951) (Justice Jackson concurring), citing from Miller on Criminal Law, 110; *see, e.g., United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915); *Pinkerton* v. *United States*, 328 U.S. 640, 643-44 (1946).

Appellant argues that since the same proof was introduced to prove both the conspiracy and substantive offenses, there is an identity of offenses requiring a merger. The issue, however, does not turn on the identity of evidence actually produced but on whether the same evidence is *required* to prove the two offenses. In this case, the requirements for conviction under the conspiracy count were the agreement between Boyle and at least one co-conspirator and the doing of at least one overt act (not necessarily making the contribution) in furtherance of that agreement. Consummation, or success, of the conspiracy was unnecessary. In order to convict under any of the substantive counts, the crime must have been completed—*i.e.*, the contribution actually made. It is also clear that appellant could have been convicted on the substantive counts without proving an agreement between himself and the co-conspirators charged in Count I. Therefore, §610 and the conspiracy statute do not punish the same thing.[34]

There is, however, an exception for situations in which the conspiracy to commit a crime produces no additional danger to society. If the statute defining the substantive offense requires concerted action and none participated other than the necessary parties, there is no additional danger and a charge of conspiracy to violate the statute will not lie:

> There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v.

---

[34] Cf. *Pereira* v. *United States, supra,* at 11-12. See *Woods* v. *United States,* 99 U.S. App. D.C. 351, 240 F.2d 37, *cert. denied,* 353 U.S. 941 (1958).

Katz, 271 U.S. 354, 355-356; *Gebardi* v. *United States*, 287 U.S. 112, 121-122.[35]

Taking these principles as established, it is clear that both statutes here involved, 18 U.S.C §610 and 29 U.S.C. §501(c), may be violated without necessarily involving any concerted effort of the alleged co-conspirators in this case. While §610 arguably might require the concert of both a union officer who consents to a political contribution and a candidate who receives the contribution, yet the conspiracy to violate §610 as charged here involved more than these two statutorily necessary parties; other union officers and employees in addition to appellant were involved in the conspiracy. Section 501(c), likewise, did not require the concert of the parties to this conspiracy. That statute may be violated by a union officer acting alone who "willfully abstracts or converts" union funds. Consequently the conspiracy to violate these statutes charged here does not fit within the narrow exception described above, but rather is governed by the principles set forth in *Pereira* v. *United States, supra.*

Appellant attempts to confuse the issue by arguing that on the facts of this case all of the alleged co-conspirators were required as a practical matter in order to violate §§ 501(c) and 610. For example, appellant states that he could not have drawn the checks on the League account without the endorsing signature of one of the co-conspirators; this co-conspirator is therefore argued to be "necessary" for the completion of the offense in this case.[36] The practical test of what is necessary under given circumstances is not the decisive test; the critical factor is that

---

[35] *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

[36] This co-conspirator was not "necessary" to the offense since appellant could have simply forged the signature of the co-signer of the check. At best, appellant's argument is that he would have had to commit the crime of forgery in order to complete the crime of contribution without the co-conspirator.

this co-conspirator was not required to exist by the statute as an element of the offense. He was only "necessary" in the sense that a skillful getaway driver may be "necessary" to a successful bank robbery; he may have made the crime easier to commit, but he was not a necessary element of the crime as it is described in the statute. A participant is "necessary" to the commission of a crime, for purposes of merging substantive and conspiracy counts, if the substantive statute requires the person's existence as an abstract legal element of the crime. Here that is simply not the case.

B. *The Court's Supervisory Power*

Appellant argues that this court should exercise its "supervisory power over federal criminal trials"[37] and overturn his conviction for conspiracy. This argument is based essentially on the contention that the use of conspiracy offenses may be suject to abuse in the hands of zealous prosecutors, who may allege conspiracy in an effort to gain tactical advantages, *e.g., otherwise* irrelevant evidence admitted. Appellant does not argue on this point that the conspiracy conviction was rendered in violation of currently applicable legal standards.

In effect appellant is asking this court to change the law of conspiracy — because the current law is unfair or bad policy. He cites no authority compelling this limitation and does not suggest a standard which we might adopt for determining when a conspiracy conviction might be allowed.[38] He simply asks that we ignore the fact that his

---

[37] Appellant's Brief at 47.

[38] Appellant refers to Judge Ely's concurring opinion in the decision in *United States* v. *Vaught*, 434 F.2d 124 (9th Cir. 1970), as support for his argument. A reading of Judge Ely's brief comments makes it clear that he did not feel that the sort of relief requested here is possible under existing law. He is, rather, expressing a desire that such a change in the law be made at a future time. *Id.* at 125.

conviction is lawful under Supreme Court authority and reverse the trial court. Precedent, prudence, and modesty compel us to decline.[39]

V. *Conclusion*

For the foregoing reasons, all convictions are

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. A. BOYLE ET AL., *Defendants*.

Crim. No. 1741-71.
Feb. 28, 1972

RICHEY, District Judge.

This case came before the Court on the Motions of the defendants, W. A. Boyle, John Owens and James Kmetz, by their attorneys, to Dismiss the Indictment, pursuant to Rule 12 of the Federal Rules of Criminal Procedure. Upon the consideration of all the evidence adduced at the hearing, the memoranda of both the Government and the defendants, and the oral arguments of counsel for the respective parties, the Court concludes that the Motions to Dismiss should be denied for the reasons hereinafter set forth.

Although each defendant filed a separate Motion to Dismiss, the grounds asserted in support of each motion were substantially the same. In this opinion the Court will note

---

[39] *See* cases cited in footnotes 30-33, *supra*.

any particular ground raised by one defendant which was not raised by the other defendants in order to prevent confusion. Basically, the following grounds have been stated in support of the motions:

(1) That the statute, 18 U.S.C. § 610 (1970), under which the defendants were indicted, is unconstitutional on its face and as applied in the instant case.

(2) That the statute 18 U.S.C. § 610 (1970), is vague and indefiinite and fails to adequately define an offense against the United States in violation of the Sixth Amendment to the United States Constitution.

(3) That the counts of the Indictment are offensive to the Sixth Amendment to the United States Constitution in that they are vague, indefinite and uncertain and fail to adequately inform the defendants of the nature and cause of the accusation against them so as to enable them to plead double jeopardy or collateral estopped or acquittal at any future trial for a similar offenses.

(4) That Count 1 of the Indictment alleges several separate and distinct conspiracies and, thus, more than one crime within a single count and therefore constitutes a prejudicial misjoinder of offenses.

(5) That Counts 2 to 13, both inclusive, with respect to defendant Boyle, and Counts 1 and 7 with respect to defendant Owens, of the Indictment each charge the defendants with the same offense as that charged in Count 1 of the Indictment in violation of their constitutional right under the Fifth Amendment to the Constitution of the United States not to be subject for the same offense to be twice placed in jeopardy of life or limb.

(6) That Count 13 of the Indictment is too broad, lacking in particularity and specificity, indefinite, inconsistent, duplicitous and therefore violates the Sixth Amendment to the Constitution of the United States, because it does not inform the defendant Boyle with particularity and

specificity of the nature and cause of the accusation contained therein and constitutes a denial of due process under the Fifth Amendment to the United States Constitution.

(7) That Count 13 of the Indictment fails to charge the defendant Kmetz with a violation of a federal law.

(8) That the Indictment, and each count thereof, is barred by the Statute of Limitations.

(9) That there were unauthorized persons in the Grand Jury room.

(10) That the statute, 18 U.S.C. § 610 (1970), is being discriminatorily enforced.

(11) That Count 13 of the Indictment fails to allege that the monies and funds of the United Mine Workers of America were used against the wishes of the members of that organization or that the defendants, W. A. Boyle and James Kmetz, were without authority of said United Mine Workers of America to do what they are alleged to have done.

(12) That defendant Owens was compelled to testify before the Grand Jury which indicted him at a time when he was a potential defendant in the instant case, thereby abridging his rights under the Fifth Amendment to the United States Constitution.

(13) That the Indictment in Criminal No. 1741-71, which superceded the Indictment in Criminal No. 346-71, was returned without the re-examination of any witnesses or records upon which the Indictment in Criminal No. 346-71 was found and without the introduction of any new evidence in violation of the defendants' rights under the Fifth Amendment to the United States Constitution.

(14) That the defendants have been denied their rights to a speedy trial as provided by the Sixth Amendment to the United States Constitution.

Constitutionality of 18 U.S.C. § 610 (1970)

The defendants challenge the constitutionality of 18 U.S.C. § 610 (1970) on several grounds ranging from abridgment of free speech under the First Amendment to discriminatory enforcement in violation of the due process clause and equal protection. The Court will treat each issue separately in order to prevent confusion.

First Amendment

Defendant Boyle argues that 18 U.S.C. § 610 (1970) (hereinafter referred to as § 610) violates a union member's right of association and his right of free speech, which are both guaranteed to him under the First Amendment to the United States Constitution. The constitutionality of the statute was recently upheld in United States v. Pipefitters Local Union No. 562, 434 F.2d 1116 (8th Cir.), aff'd on rehearing en banc, 434 F.2d 1127 (1970), cert. granted, 402 U.S. 994, 91 S.Ct. 2168, 29 L.Ed.2d 160 (1971). In the Pipefitters' case the court noted that the First Amendment clearly protects freedom of association, and that the activities of a labor union fall within the purview of this protection. *Id.* at 1122. However, the Court was careful to point out that the rights of association are not absolute and may be regulated by the government in certain instances. *Id.* at 1122. *See also* Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

In order to permit the government to regulate in a constitutionally protected area, such as freedom of association or freedom of speech, a court must weigh the interests of the respective parties. In the instant case the Court must examine and balance the interests of the government in having such a regulation and the organization's interest in its freedom of association. Only if the government's interest is compelling, will the statute retain its enforceability under the Constitution. This Court agrees with the *Pipe-*

fitters' court where it stated that the government has a compelling reason.

> "[s]ince it is possible for a person to be required to join a union as a condition of employment, one of the purposes for the passage of 18 U.S.C.A. § 610 was to 'protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views." *Id.* 434 F.2d at 1123.

Furthermore the *Pipefitters'* court stated:

> "Congress in passing 18 U.S.C.A. § 610 was attempting to protect the individual union member's right to his own political views and the right to support or not to support them through money contributions. In light of the substantial interest each individual has in his own political activities, it follows that Congress in passing the legislation was responding to a compelling interest." *Id.* at 1123.

This Court finds that the statute is sufficiently narrow on its face and in its application so that it does not unnecessarily infringe on Constitutional rights beyond those where the government has demonstrated a compelling interest in regulating. The individual union member can still join or make contributions to separate voluntary political organizations, since these activities are not in any way proscribed by the statute. The union however, is precluded from making the contributions for him. The union can engage in a wide variety of political activities without violating the statute, such as active political endorsement through the medium of regular union newspapers and other house organs directed primarily to the union's membership. *See, e. g.*, United States v. C.I.O., 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948). It is only when the union engages in active electioneering on behalf of particular Federal candi-

dates with the idea of reaching the public at large rather than its own membership, that the statute's proscription against the use of general union funds becomes applicable.

In United States v. Auto Workers, 352 U.S. 567, 588-89, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957), the United States Supreme Court thoroughly analyzed the purposes of § 610. Essentially, they are twofold: (1) to prevent corruptive influences on the elective process; and (2) to prevent the use of general union funds to support ideas and candidates opposed by even the slightest minority of the union membership. *Id.* at 568-89, 77 S.Ct. at 529. The Supreme Court stated that:

> "[The statute's] aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Id.* at 575, 77 S.Ct. at 533.

This Court finds no reason to reject what appears to be a legitimate governmental objective, and therefore holds that the statute is constitutional with respect to the First Amendment, and with respect to its application in the instant case. The Indictment clearly alleges that monies from the union were used or directed toward political activities expressly prohibited by the statute. Furthermore, the Court believes that indirect transmission of the funds is no less illegal than direct transmission. The purpose of the statute is to preclude use of funds from general union dues for electioneering purposes in Federal elections. Although the statute does not expressly preclude indirect contributions from general funds of the union, the legislative history and the Supreme Court's opinion in United States v. Auto Workers, *supra,* clearly indicates that Congress wished to prohibit any type of use of the general

union funds for the designated purposes of the statute. This would include both a direct and/or an indirect contribution or expenditure.

Article 1, Section 2, and the 17th Amendment to the Constitution

The Court finds little merit to this argument, since as indicate earlier in this opinion, the individual union member is still free to join a political organization or to send a contribution to such an organization. In addition, he still maintains his individual right to choose the congressional candidate of his choice at the ballot box. Section 610 merely prohibits the union from infringing upon this individual right by prohibiting general union funds from being used to support candidates or political causes which the individual union member may not agree with.

Due Process and Equal Protection

The defendants argue that §610 arbitrarily discriminates against the unions and their members in violation of due process and equal protection. In United States v. Petrillo, 332 U.S. 1, 8-9, 67 S.Ct. 1538, 91 L.Ed. 1877 (1941), the Supreme Court held that Congress has the power to act selectively, and that the fact a prohibition directed at one class does not reach every other class upon which Congress may constitutionally place limitations, does not render the particular prohibition invalid. As the Supreme Court stated in United States v. C.I.O., *supra*:

> "It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose." *Id.* 335 U.S. at 115, 68 S.Ct. at 1354.

The preceding statement clearly indicates the reason Congress placed the prohibition on labor unions, and this Court believes that the classification is rationally based.

The *Pipefitters'* court dispells the equal protection argument where it states:

> "The problem with this argument is that § 610 does not prohibit working men from such activity. Section 610 only prohibits them from being forced into it. Therefore, § 610 does not create a classification which is subject to an equal protection claim." *Id.* 434 F.2d at 1124.

Vagueness

Defendant Boyle argues that § 610 is vague and indefinite and fails to adequately define an offense against the United States in violation of the Sixth Amendment. The test for constitutional vagueness is described in United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) as follows:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 617, 74 S.Ct. at 812.

Furthermore, in Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961), the Supreme Court added:

> "The vice of unconstitutional vagueness is further aggravated where, * * * the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Id.* at 287, 82 S.Ct. at 281.

Essentially, the vagueness problem narrows down to whether a person could know from reading § 610 what is prohibited by its terms. *See* United States v. Pipefitters Local Union No. 562, *supra*, 434 F.2d at 1124.

The Indictment in the case at bar clearly alleges that a direct contribution was made by a labor organization to candidates seeking Federal offices. Section 610 unequivocally proscribes such conduct. As the court in United States v. Pipefitters Local Union No. 562, *supra*, stated:

> "A labor organization can predict what its officials and employees may do by evaluationg the organizations' duty under § 610 and not allow its officials and employees to engage in conduct which is inconsistent with this duty." *Id.* 434 F.2d at 1124.

The Constitution requires that the statute convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." United States v. Petrillo, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542 (1941). The Court believes that the preceding standards have been met by § 610, and that the statute therefore is not vague or indefinite.

Discriminatory Enforcement

The Court has already given full consideration to defendant Boyle's argument relating to discriminatory enforcement in its opinion dated September 27, 1971, which is adopted and made a part hereof by reference.

MULTIPICITY

Defendants Boyle and Owens argue that the government has taken one conspiracy and divided it into many different substantive offenses, thereby subjecting the defendants to multiplicitous prosecution for one transaction in violation of their Fifth Amendment right against being placed in double jeopardy.

The Courts have consistently held that it is legally proper to include in an indictment both a conspiracy count and substantive counts which are in part based on the allegations underlying the conspiracy charge. *See* Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1948); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964). It is also settled that a conspiracy charge is separate and distinct from the substantive offense, and therefore a plea of double jeopardy will not bar convictions on both charges. *See* Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489 (1948); Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954). Furthermore, the fact that the overt acts in the conspiracy count are the same acts charged in the substantive counts does not render the indictment deficient. See Pinkerton v. United States, *supra*, at 644, 66 S.Ct. 1180. As the Supreme Court stated in United States v. Bayer, 331 U.S. 532, 542, 67 S.Ct. 1394, 1399, 91 L.Ed. 1654 (1910):

> "The same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself."

Based on the foregoing decisions, this Court finds that the Indictment does not violate their right against being placed in double jeopardy.

Duplicity

Defendants Boyle and Owens contend that Count 1 of the Indictment should be dismissed, because they believe that this single count charges three distinct conspiracies, therefore making it duplicitous. An agreement to violate the law remains a single conspiracy although the agreement continues over a considerable period of time and contemplates numerous violations of the federal law. See Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87

L.Ed. 23 (1942). The Court realizes that where there is only one agreement to engage in criminal activity, the charging of a separate conspiracy for each criminal act would be prejudicial to the defendants, and the indictment itself would be subject to attack as multiplicitous. Braverman v. United States, *supra*. It must also be noted that separate conspiracies cannot be charged in a single count in the Indictment. *See* Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Indictment in the case at bar charges a continuing conspiracy.

The defendants base their argument primarily on United States v. Goldberg, 206 F.Supp. 394 (E.D.Pa.), aff'd without consideration of the conspiracy count, 330 F.2d 30 (3d Cir. 1962), cert. denied, 377 U.S. 953, 84 S.Ct. 1630, 12 L.Ed. 2d 497 (1964) The Court has researched this case, and notes that the case has been rejected insofar as the conspiracy point is concerned by at least one judge on the United States District Court for the District of Columbia. In United States v. Baker, 262 F.Supp. 657, 684 (1966), aff'd without comment on this issue, 131 U.S.App.D.C. 7, 401 F.2d 958 (D.C.Cir.1968), 139 U.S.App.D.C. 126, 430 F.2d 499 (1970), cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1971), Judge Oliver Gasch stated:

> "The defense memorandum also objects to the inclusion in Count 9 of conspiracy charges relating to the taxable years 1963 and 1964, arguing that a single count may embrace no more than the charge concerning a single year. A single conspiracy, however, to evade taxes for two or more years has been sustained. United States v. Haskell, 327 F.2d 281 (2d Cir. 1964), cert. denied, 377 U.S. 945, 84 S.Ct. 1351, 12 L.Ed.2d 307 (1964); Lott v. United States, 309 F.2d 115, 120 (5th Cir. 1962), cert. denied, 371 U.S. 950, 83 S.Ct. 504, 9 L.Ed. 2d 498 (1963), which appears to be contra to the case on which the defense relies, United States v. Goldberg, 206 F. Supp. 394 (D.C.E.D.Pa. 1962).

After carefully examining United States v. Haskell, *supra*, and Lott v. United States, *supra*, the Court finds that the Indictment alleges a continuing conspiracy, and therefore it is not duplicitous.

UNAUTHORIZED PERSONS IN GRAND JURY ROOM

The Court finds no merit in this unsupported allegation by defendant Boyle. Neither in the Memorandum of Points and Authorities in Support of the Motion to Dismiss nor at the hearing on the Motion was any evidence produced substantiating this claim. The Court realizes that the presence of an unauthorized person in the grand jury room raises a presumption of prejudice to the defendant. *See* Latham v. United States, 226 F. 420, 424 (5th Cir. 1915); United States v. Carper, 116 F.Supp. 817, 820 (D.D.C.1953). In considering a motion to dismiss the Indictment on this ground, the Court is not concerned with the possible guilt or innocence of the defendant, the seriousness of the charge, or even the possible effect of the court's decision on the case. *See* United States v. Carper, *supra*, 116 F.Supp. at 821. However, an objection on this ground must state facts, rather than mere conclusions. *See* United States v. Brumfield, 85 F. Supp. 696, 705 (D.C.La.1949). No specific facts have been alleged in the instant case; therefore, the Court denies dismissal on this ground.

DEFENDANT'S APPEARANCE BEFORE GRAND JURY

The law is clear that if the defendant is called by the grand jury, he is required to appear and to testify, although like any other witness he may claim his privilege with regard to any particular question that may be incriminating. *See* United States v. Irwin, 354 F.2d 192, 198-99 (2d Cir.), cert. denied, 383 U.S. 967, 86 S.Ct. 1272, 16 L.Ed.2d 308 (1965); United States v. Bachman, 164 F. Supp. 898 (D.D.C. 1958). In the case at bar defendant Owens was not a defendant at the time he appeared before the grand jury

as a witness. This is very similar to the circumstances in United States v. Wolfson, 294 F.Supp. 267 (D.C.Del. 1968). In that case the court held that even if the grand jury acquired incriminating evidence from a grand jury witness in violation of his Fifth Amendment right against self-incrimination, said witness, who later became a defendant, was at most entitled to suppress the evidence and its fruits if they were sought to be used at trial, but it would not bar prosecution altogether. *Id.* at 274-75. The cases are in conflict as to whether or not a potential defendant should be warned of his rights under the Fifth Amendment when he testifies before the grand jury. In at least one case in this circuit, the United States Court of Appeals for the District of Columbia found that this was a crucial stage in the criminal proceedings, and therefore a potential defendant should be warned of his rights. *See* Jones v. United States, 119 U.S. App.D.C. 284, 342 F.2d 863 (1964).

Defendant Owens has failed to substantiate his claim that his Fifth Amendment rights were violated by the fact that he was compelled to testify before the grand jury. The only evidence of any such violation is a mere allegation on the part of the defendant that his rights were infringed upon; therefore, the Court finds insufficient grounds to dismiss the indictment pursuant to this argument.

Statute Of Limitations

The defendants argue that the indictment, and each count thereof, is barred by the statute of limitations. However, they fail to indicate any case law in support of this contention. In United States v. Ewell, 383 U.S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966), the Supreme Court stated that the statute of limitations "is usually considered the primary guarantee against bringing overly stale criminal charges." Where conspiracy charges are involved, the statute of limitations begins to run from the date of the last overt act. United States v. Johnson, 165 F.2d 42 (3d

Cir.), cert. denied, 322 U.S. 852, 68 S. Ct. 355, 92 L.Ed. 422 (1947). The indictment in the case at bar indicates that the last overt act occurred on or about June 10, 1969. The Court finds that the indictment was founded well within the five-year period of limitation provided by 18 U.S.C § 3282 (1970).

SPEEDY TRIAL

The defendants argue that they have been denied their constitutional right to a speedy trial under the Sixth Amendment and their constitutional rights to due process of law under the Fifth Amendment to the Constitution of the United States. Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> "(b) *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

The United States Supreme Court in United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), has recently considered the problem presented by the defendants in their motion. First, the Court indicated that Rule 48(b) was limited to post-arrest situations. *Id.* at 463. The Court then stated:

> "Appellees do not claim that the Sixth Amendment was violated by the two-month delay between the return of the indictment and its dismissal. Instead, they claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. In our view, however, the Sixth Amend-

ment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event which occurred in this case only when the appellees were indicted on April 19, 1970.

The Sixth Amendment provides that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .' On its face, the protection of the amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch which is appropriate to assure him an early and proper disposition of the charges against him. '[T]he essential ingredient is orderly expedition and not mere speed.' Smith v. United States, 360 U.S. 1, 10, [79 S.Ct. 991, 3 L.Ed.2d 1041] (1959)." *Id.* at 459.

In the case at bar there have been two indictments returned within the past year. The indictment in Criminal No. 346-71 was returned March 2, 1971. The indictment in Criminal No. 1741-71 supersedes the indictment in Criminal No. 346-71, and it was returned on October 4, 1971. The Court does not believe that the defendants have demonstrated any prejudice which would require dismissal. The only delay in the case at bar to date was caused by the necessity of getting a transcript prepared from the motions hearings held during September, 1971, in order to argue the supplemental motions filed with respect to the new indictment. The Court believes that the case has been progressing in an orderly manner well within the standards discussed by the Supreme Court in the *Marion* case.

Lack Of New Evidence Before Grand Jury

Defendants Boyle and Owens have argued that the indictment in Criminal No. 1741-71 should be dismissed on the grounds that the indictment was obtained without re-examination of witnesses or documents supporting an earlier and substantially similar indictment in Criminal No. 346-71. The government states that the indictment in Criminal No. 1741-71 was presented to the same grand jury which returned the indictment in Criminal No. 346-71, without the presentation of new evidence or review of the evidence previously considered by the grand jury. The government read the later indictment in its entirety to the members of the grand jury before the new indictment was returned in Criminal No. 1741-71.

In Lawn v. United States, 355 U.S. 339, 349-50, 78 S.Ct. 311, 2L.Ed.2d 321 (1958), the United States Supreme Court displayed its refusal in the exercise of its supervisory power to allow defendants any latitude in examining either the adequacy or competency of evidence supporting criminal indictments. The Court stated:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires no more." *Id.* at 349-50, 78 S.Ct. at 318, quoting, Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

The preceding principle was applied by the United States Court of Appeals for the Fifth Circuit in United States v. James, 290 F.2d 866 (5th Cir.), cert. denied, 368 U.S. 834, 82 S.Ct. 60, 7 L.Ed. 2d 36 (1961), where the court stated:

> "The fact that the same Grand Jury after hearing evidence has previously returned an indictment purporting to charge the same offense does not deprive

the subsequent indictment returned without hearing additional evidence of the usual presumption of validity. The Grand Jury may use what it has legally heard before." *Id.* at 869.

It was pointed out by the government during the hearing on the defendants' Motion to Dismiss that the grand jury which returned the new indictment in Criminal No. 1741-71 was a special grand jury, and further that this grand jury had only heard evidence with respect to three cases since it returned the indictment in Criminal No. 346-71. The Court does not believe that another presentation of same evidence to members of the same grand jury which returned the indictment in Criminal No. 346-71 would have yielded any meaningful protection to the defendants. Such a presentation would have only served to delay the orderly administration of justice, which this Court feels would not be in the best interest of the defendants. Based on the foregoing, the Court concludes that dismissal of the indictment on these grounds should be denied.

FAILURE TO ALLEGE A VIOLATION OF 18 U.S.C. § 610 (1970)

The defendants argue that the indictment fails to allege a violation of or a crime under the provisions of 18 U.S.C. § 610 (1970), because that statute does not provide that it is unlawful for an officer of a labor organization to consent to any contribution prohibited by this section. The Court has carefully read that statute as a whole, and it has concluded that the defendants' argument is without merit. Furthermore, the Court disagrees with the defendants' contention that the United Mine Workers of America should be indicted and convicted as a condition precedent to the indictment and conviction of its officers. This Court is in no position to argue with the prosecutorial discretion of the Attorney General. *See also* this Court's Opinion in United States v. Boyle, 338 F. Supp. 1025 Criminal No. 346-71, decided September 27, 1971.

Having given full consideration to the arguments of counsel and the memoranda and points and authorities filed with respect to the Motion to Dismiss in both Criminal No. 1741-71 and Criminal No. 346-71, the Court concludes that the defendants' Motions to Dismiss be and the same hereby are denied.

[*Post-trial hearing on Motion for New Trial, June 27, 1972*]

The Court: How would you describe your motion to the court this morning, Mr. Cacheris?

Mr. Cacheris: Well, I think, Your Honor, technically, it would have to be a motion for a new trial, based on the fact that the Pipefitters case came down during the pendency of this case.

The Court: Very well. The court finds that the facts in the case of Pipefitters Local Union No. 502, et al., v. The United States, decided by the Supreme Court of the United States on June 22, 1972, are not the same or similar to those in the case at bar. Accordingly, the motion will be denied.

It is adjudged as to Count 13 that the defendant is hereby committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of five years, and that the defendant become eligible for parole under Title 18, Section 4208(a)(2), at such time as the Board of Parole may determine, and that he is hereby fined the sum of $10,000 as to that count.

* * * * * * * * * *

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-143

W. A. BOYLE, *Petitioner*

v.

UNITED STATES

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 14, 1973

/s/ WARREN E. BURGER
Warren E. Burger
Chief Justice of the United States.

Dated this First day of August, 1973

APPENDIX D

(1) United States Constitution, Amendment I, provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(2) United States Constitution, Amendment V, provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

(3) United States Code, Title 18, Section 371, provides in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States, * * * in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(4) United States Code, Title 18, Section 610, at the time of the indictment provided in pertinent part:

> It is unlawful for * * * any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in * * * Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. * * *
>
> [E]very * * * officer of any labor organization, who consents to any contribution or expenditure by the * * * labor organization * * * in violation of this sec-

tion, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(5) United States Code, Title 29, Section 501(c), provides in pertinent part:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.